IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

JULIA M. TAYLOR	:	
v.	:	Civil Action No. DKC 2004-0710
GIANT FOOD, INC.	:	

MEMORANDUM OPINION

Presently pending in this employment discrimination case are (1) the motion of Plaintiff to remand to state court, pursuant to 28 U.S.C. § 1447(c) or 28 U.S.C. § 1367(c); and (2) the motion of Defendant to dismiss for lack of subject matter jurisdiction, pursuant to Fed. R. Civ. P. 12(b)(1), and for failure to state a claim, pursuant to Fed. R. Civ. P. 12(b)(6). The issues are briefed and the court now rules pursuant to Local Rule 105.6, no hearing being deemed necessary. For the reasons that follow, the court holds in abeyance both Plaintiff's motion to remand and Defendant's motion to dismiss, and directs Plaintiff, within fifteen days of entry of this Order, to file a more definite statement, pursuant to Fed. R. Civ. P. 9(b), as specified *infra*.

I. Background

On February 27, 2004, Plaintiff filed an action in Maryland state court, alleging wrongful and abusive discharge by her

employer, a large grocery chain. *See* paper no. 2. Defendant removed the action to this court, after which Plaintiff moved to remand to state court. *See* paper nos. 1 and 9. Plaintiff then amended her complaint, this time alleging employment discrimination based on race and sex, retaliatory discharge, and misrepresentation and deceit. *See* paper no. 14. Defendant moved to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6). *See* paper no. 24.[1]

II. Standard of Review

It is well-settled that the removing party bears the burden of proving proper removal. *Greer v. Crown Title Corp.,* 216 F.Supp.2d 519 (D.Md. 2002) (citing *Mulcahey v. Columbia Organic Chems.* Co., 29 F.3d 148, 151 (4th Cir. 1994)). On a motion to remand, the court must "strictly construe the removal statute and resolve all doubts in favor of remanding the case to state court," indicative of the reluctance of federal courts "to interfere with matters properly before a state court." *Richardson v. Phillip Morris Inc.*, 950 F.Supp. 700, 701-02 (D.Md. 1997) (internal quotation omitted); *see also Mulcahey,* 29 F.3d at 151.

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[1] Defendant earlier moved to dismiss Plaintiff's original complaint. In light of Plaintiff's amended complaint and Defendant's subsequent motion to dismiss that complaint, Defendant's original motion to dismiss was denied as moot.

III. Analysis

Remand is required in some instances and optional in others. "If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." 28 U.S.C. § 1447(c). Additionally, even if the court has original jurisdiction over a civil action, the court nevertheless has discretion to remand a case to state court if

> (1) the claim raises a novel or complex issue of State law,
> (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
> (3) the district court has dismissed all claims over which it has original jurisdiction, or
> (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

28 U.S.C. § 1367(c).

Remand is favored in cases turning primarily on questions of state law, because "[n]eedless decisions of state law [by federal courts] should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law." *United Mine Workers of America v. Gibbs,* 383 U.S. 715, 729 (1966). Thus, in a case where federal claims are eliminated before trial, "the balance of factors . . . will point toward declining to exercise

jurisdiction over the remaining state-law claims." *Carnegie-Mellon Univ. v. Cohill,* 484 U.S. 343, 350 n.7 (1988).

In her motion to remand, Plaintiff argues that, because her claims sound in Maryland law, her case belongs in state court. Responding to arguments in Defendant's Notice of Removal, Plaintiff also asserts that (1) the court should consider remand in light of her amended complaint, not her original complaint; and (2) her claims are not subject to preemption under § 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185(a), because resolution of her claims does not require a court to interpret any term of the collective bargaining agreement ("CBA") between her employer and her union. *See* paper no. 9, at 1-2.

To satisfy its burden of proving proper removal, Defendant, in opposition to the motion to remand, argues that (1) Plaintiff should not be allowed to defeat removal by amending her complaint, and the wrongful and abusive discharge claim in Plaintiff's original complaint is preempted by § 301; and (2) even if the decision whether to remand is made on the basis of her amended complaint, Plaintiff's claims are preempted by § 301 because they are "inextricably intertwined" with the terms of the CBA. *See* paper no. 19, at 1-2, 19.

As will be seen, the question whether removal was initially proper is moot in this case. If, as Plaintiff contends, none of her claims in the amended complaint are preempted, then only state law claims remain and the court will exercise discretion to remand to state court. On the other hand, if at least one of the claims in her amended complaint is preempted, then the court will possess federal question subject matter jurisdiction over that claim, and may exercise supplemental jurisdiction over the others. Both parties acknowledge that if federal subject matter jurisdiction exists in this case, it is rooted solely in § 301 preemption. If § 301 does not preempt any of Plaintiff's state law claims, no reason remains for this court to retain the case, and the court will exercise its discretion under *Gibbs* and *Cohill* to remand to the state court. *See supra* at 3. On the other hand, if § 301 preempts any of Plaintiff's claims, only a federal court can decide those claims. *See Allis-Chalmers Corp. v. Lueck,* 471 U.S. 202, 209-10 (1985) (citing *Teamsters v. Lucas Flour Co.,* 369 U.S. 95, 103 (1962)). The only question this court need address, then, is whether any of Plaintiff's claims is preempted by § 301; whether removal was initially proper is moot, and is not considered here.

A. Plaintiff's Intent in Amending Her Complaint

Defendant argues unpersuasively that Plaintiff impermissibly amended her complaint merely to defeat federal jurisdiction. *See* paper no. 19, at 2-9. It is not at all clear, and it is disputed by Plaintiff, that defeating federal jurisdiction was Plaintiff's sole intent in amending her complaint. But even assuming *arguendo* that (1) Plaintiff's original complaint contained a federal question, and (2) Plaintiff's only intent in amending her complaint was to eliminate that federal question, Defendant misstates the law. Defendant is correct that "removal is not *defeated*" by such manipulation, Paper no. 19, at 3 (quoting *Hammond v. Terminal R.R. Assoc.,* 848 F.2d 95, 97 (7th Cir. 1988)) (italics added), but it does not follow that the court may not exercise its *discretion* to remand merely because Plaintiff engaged in such behavior. In *Cohill,* the Court stated that the concern for forum manipulation through deletion of federal claims from the complaint "hardly justifies a categorical prohibition on the remand of cases involving state-law claims regardless of whether the plaintiff has attempted to manipulate the forum and regardless of the other circumstances in the case." 484 U.S. at 357. That Court held that "a district court has discretion to remand to state court a removed case involving pendent claims upon a proper determination that retaining jurisdiction over the case would be inappropriate."

Id. Manipulation of the forum by amendment of the complaint, the court said, is a factor for the court to consider, but not a dispositive one. *See id.* ("[A] district court can consider whether the plaintiff has engaged in any manipulative tactics when it decides whether to remand a case. If the plaintiff has attempted to manipulate the forum, the court should take this behavior into account in determining whether the balance of factors . . . support a remand.").

Defendant cites the holding of the Fourth Circuit case *Brown v. Eastern States Corp.,* 181 F.2d 26 (4th Cir. 1950), for the proposition that remand is strictly improper if a plaintiff has amended the complaint to manipulate the forum. This holding, however, has been rejected consistently in light of *Gibbs'* declaration that "if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well." 383 U.S. at 726, and courts in this circuit have sometimes remanded cases despite the appearance of manipulation. *See, e.g., Fleeman v. Toyota Motor Sales,* 288 F.Supp.2d 726, 729 (S.D.W.Va. 2003) (remanding and noting consistent rejection of *Brown* in favor of *Gibbs* in Fourth Circuit cases); *Kimsey v. Snap-On Tools Corp.,* 752 F.Supp. 693, 695 (W.D.N.C. 1990) (remanding and noting that

"[*Gibbs*] eviscerated the holding of *Brown*") ("While Plaintiffs may be attempting to avoid federal jurisdiction by amending the complaint, . . . such a reason '. . . does not diminish the right of these plaintiffs to set the tone of their case by alleging what they choose.'") (quoting *McGann v. Mungo,* 578 F.Supp. 1413, 1415 (D.S.C. 1982)).[2]

This court therefore considers Plaintiff's intent in amending her complaint as one factor in the question whether to remand. Here, that factor matters little compared to the interest of comity and the avoidance of "[n]eedless decisions of state law" embraced in *Gibbs*. 383 U.S. at 729. Because remand is favored in cases turning primarily on questions of state law, and because remand in this case otherwise turns entirely on whether questions of state law are preempted by questions of federal law, Plaintiff's intent in amending her complaint will not "diminish [her] right" to allege what she chooses.

B. Section 301 Preemption

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[2] Defendant also cites the unpublished opinion *Binkley v. Loughran,* 940 F.2d 651 (4th Cir. 1991), for the proposition that "it is not permissible for the plaintiff to bring about a remand of an action by amendment of the complaint to eliminate any basis for the federal claim." Rule 36(c) of this circuit provides that citation of this circuit's "unpublished dispositions in briefs and oral arguments in this Court and in the district courts within this Circuit is disfavored." The *Binkley* opinion is therefore nonbinding here. *See Fleeman,* 288 F.Supp.2d at 729 n.2.

Section 301 of the LMRA, 29 U.S.C. § 185(a), provides, in pertinent part:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

In *Lingle v. Norge Div. of Magic Chef, Inc.,* 486 U.S. 399 (1988), the Supreme Court held that "an application of state law is preempted by § 301 . . . only if such application requires the interpretation of a collective-bargaining agreement." *Id.* at 413. Like other state law claims, discrimination, retaliatory discharge, and misrepresentation claims are not preempted by § 301 unless the claims require interpretation of a collective-bargaining agreement. *See, e.g., Owen v. Carpenters' Dist. Council,* 161 F.3d 767, 776 (4th Cir. 1998) (discrimination, retaliatory discharge) (citing *Lingle*); *Jenkins v. PBG, Inc.,* 268 F.Supp.2d 593, 596-98 (D.Md. 2003) (misrepresentation) (citing *Miller v. Fairchild, Inc.,* 668 F.Supp. 461 (D.Md. 1987)). To the extent that Plaintiff's claims "primarily concern[] the conduct of the employee and the conduct and motivation of the employer," her claims "will not require or depend on an interpretation of the CBA." *Owen,* 161

F.3d at 776. Moreover, "the bare fact that a collective-bargaining agreement will be consulted in the course of state-law litigation plainly does not require the claim to be extinguished." *Livadas v. Bradshaw,* 512 U.S. 107, 124 (1994) (citing *Lingle,* 486 U.S. at 413 n.12). The boundary between claims requiring "interpretation" of a CBA and ones that merely require such an agreement to be "consulted" has rightfully been labeled elusive. *See Wynn v. AC Rochester*, 273 F.3d 153, *158* (2nd Cir. 2001). The Fourth Circuit, in *Martin Marietta Corp. v. Maryland Comm'n on Human Relations,* 38 F.3d 1392 (4th Cir. 1994), citing *Lingle,* offered a nuance:

> If the final resolution of the state law dispute tangentially involves some interpretation of a provision of the agreement, this fact alone would not require automatically that [plaintiff's] claim be preempted by § 301. As the Supreme Court recognized in *Lingle,* a complete resolution of a state law claim may depend on both the meaning of a specific term in a CBA and separate analysis under state law, but in such a case, federal law would govern the interpretation of the agreement, and state law analysis would not be preempted.

Id. at 1401 (citing *Lingle,* 486 U.S. at 413 n.12). In other words, interpretation considered "tangential" to the state law dispute, yet still strictly necessary for complete resolution of the claim, will not require § 301 preemption. It falls to this court to determine which interpretations are "tangential" and which are sufficiently central to the claim to require

preemption. In the case of a "close-call," where courts could disagree about whether the claims were preempted, courts are meant to "strictly construe the removal statute and resolve all doubts in favor of remanding the case to state court." *Jenkins,* 268 F.Supp.2d at 600 (quoting *Richardson*, 950 F.Supp. at 702).

In this case, the question whether Plaintiff's claims are preempted by § 301 is muddied by the imprecision of Plaintiff's amended complaint. Plaintiff asserts claims of employment discrimination based on race and sex, retaliatory discharge, and misrepresentation and deceit, but it is not always clear which of Defendant's acts she intends to offer in support of each of these claims.[3]

1. Discrimination

Plaintiff's discrimination claim is sufficiently discernible: Plaintiff alleges that because she is an African American and female, she was (1) treated differently than white, male employees with respect to complaints she made about another driver (*see* paper no. 14, at ¶ 37); (2) harassed about her medical condition and restricted in her work differently than

[3] More generally, the court notes with concern, and not for the first time, Plaintiff's counsel's "frequent typographical errors, citation errors and clear misstatements of the law in memoranda." *Carson v. Giant Food, Inc.,* 187 F. Supp. 2d 462 (D.Md. 2002).

white, male employees with medical conditions (*see* ¶ 49); and (3) disciplined differently than white, male employees for tardiness and failure to "call in" as required (*see* ¶ 51). These are purely factual questions that require no interpretation of the CBA to determine whether Plaintiff was treated differently than other employees because of her race and/or gender. Therefore this claim is not preempted by § 301.

2. Retaliatory Discharge

Plaintiff's retaliatory discharge claim is also clear: Plaintiff claims she was fired for having previously brought discrimination complaints against Defendant. *See* paper no. 14, at ¶ 100. No interpretation of the CBA is necessary to resolve this question, either. Defendant disagrees; in Defendant's telling, Plaintiff claims Defendant terminated her employment because she refused to undergo an independent medical examination ("IME") as requested by Defendant. *See* paper no. 19, at 20-21. Defendant argues that the court must interpret Article 22 of the CBA in order to determine whether Plaintiff was justified in refusing to undergo the IME, whether Plaintiff's Department of Transportation ("DOT") certification should have excused her from the IME requirement, and whether

Defendant was justified in firing her.[4] *Id.* It is clear, however, that Plaintiff asserts that her discharge was Defendant's retaliation, not for her refusal to undergo the IME, but for her complaints of discrimination. *See* paper no. 14, at ¶ 123 ("Defendant in retaliation and for the sole purpose to discharge Plaintiff, manufactured, [sic] and orchestrated events and circumstances to justify why it allegedly needed Ms. Taylor to take an IME."). Therefore this claim is also not preempted by § 301.

Defendant further contends that, because Defendant asserts it had good cause to terminate Plaintiff's employment, the court must interpret Article 10 of the CBA before it can determine whether Plaintiff's discharge was retaliatory. *See* paper no. 19, at 21 n.6. Article 10 provides that Defendant may discharge or suspend any employee for good cause. But Defendant's professed good cause is Plaintiff's failure to follow their

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[4] Article 22 provides, in pertinent part:

> Physical, mental or other examinations required by a government body or the Company shall be promptly complied with by all employees . . . . The Company shall not prohibit an employee with a current valid D.O.T. card from working unless the Company has reasonable cause to believe the employee has a physical or mental condition which necessitates that he be reexamined.

instruction to take the IME, an instruction Plaintiff contends was issued "for the sole purpose to discharge Plaintiff." Paper no. 14, at ¶ 123. The issue, then, is not whether Defendant may discharge an employee for good cause, but whether Defendant's alleged good cause was "manufactured[] and orchestrated," *id.*, for the purpose in retaliation. Retaliation cannot constitute good cause under any conceivable interpretation of the CBA, so resolution of this issue does not require interpretation of the CBA. Therefore exercise of Article 10 cannot cause Plaintiff's retaliatory discharge claim to be preempted by § 301.

3. Misrepresentation and Deceit

Plaintiff's claim of misrepresentation and deceit is unworkably ambiguous. It is insufficient for Plaintiff to assert that "Plaintiff states that she relied upon Giant prior representations [sic] in its November 14, 2002 and December 14, 2002 letters," that "Plaintiff relied on Giant's misrepresentations to her detriment," (*see* paper no. 14, at ¶ 142) and that "Plaintiff lost her employment at Giant because Giant falsely and deceitful [sic] misrepresented her statements during the February 28, 2002 meeting . . . ." (¶ 145). It is simply unclear upon which of Defendant's statement(s) Plaintiff bases her claim of misrepresentation and deceit, and which statements are ancillary to the claim, serving merely to fill out the story with respect to this or her other claims. In her amended complaint, Plaintiff alleges numerous statements by Defendants that might be characterized as misrepresentations, including at least the following:

- "Giant supervisors told Taylor that they would get back to her about her complaints but failed to do so." (Paper no. 14, at ¶ 31)
- Taylor "reported to her supervisor David Mulberry that there had been an accident to [sic] her vehicle" before her

shift began. Mulberry "informed Taylor that he would look into it and get back to her but never did." (¶ 32)

- "Although Taylor had been approved by for [sic] 'FMLA Intermittent Leave,' ... Giant and its employees ... refused to honor Taylor's request for FMLA leave." (¶ 59)
- "Weiss, Giant's Vice President[,] advised Ms. Taylor ... that her [sic] only consequence for not submitting to an IME [independent medical examination] was that grievances of March 4, 5 and 11, 2002, and May 8, 2002 would be denied and she may have her FMLA leave denied in the future." (boldface omitted) (¶ 83; allegation repeated at ¶ 128)
- "Smith immediately threatened Ms. Taylor that if [sic] she would not have a job at Giant unless she took an IME and if Giant's doctors determined that she needed a hysterectomy then she would also have to agree to allow Giant's doctors to perform the hysterectomy." (¶ 94)
- "Taylor informed Ms. Smith that she was not going to have an IME and that both Giant and her Union had previously told [sic] she did not have to have any IME." (¶ 95)
- "Plaintiff reasonable [sic] relied on Giant's representations that a valid DOT certification was [g]ood [sic] for 2 years." (¶ 144)

Plaintiff has not identified precisely the alleged misrepresentation(s) for which she seeks relief, making it impossible to determine whether resolution of this claim depends upon interpretation of terms in the CBA. Therefore, if Plaintiff seeks to proceed on this claim, she must file a more definite statement and plead with particularity as required by Fed. R. Civ. P. 9(b) and 12(e). The court directs Plaintiff to file her statement within fifteen days of entry of this Order.

In addition to the IME requirement discussed *supra*, Defendant's memorandum in opposition to Plaintiff's motion to amend specifies other provisions of the CBA Defendant thinks are "inextricably intertwined" with Plaintiff's claims. For the reasons that follow, the court disagrees.

4. Failure To "Call-In" and Tardiness

Plaintiff alleges that she was disciplined for tardiness despite having supplied medical documentation of her inability to comply with Article 15 of the CBA, which requires that employees notify ("call in" to) Giant at least 1.5 hours in advance of failing to report to work. Plaintiff also alleges she was charged with separate incidents despite the fact that "Giant was required to link related medical incidents as if there was one incident [sic]." *See* paper no. 14, at ¶ 51. Defendant asserts that the court must interpret both Article 15

and Schedule D of the CBA, because the former contains no express medical exception to the call-in requirement and the latter expressly requires that absences be treated as a single infraction when related to a single medical condition, but is silent on the question of grouping tardiness incidents in an analogous manner. *See* paper no. 19, at 22-23.

Here, the court can safely conclude that no interpretation of the CBA is necessary. Plaintiff alleges that

> Giant charged Taylor with separate and multiple incidents. Taylor complained that even after bring in [sic] medical documentation Giant still refused to remove the disciplinary actions. Giant's practice and policy was to accept the medical documentation and not charge the employee with an 'incident' (infraction). However, Giant did this only for Caucasians and males and not Taylor an African American female.

Paper no. 14, at ¶ 51. Plaintiff makes plain that her objection is not to any term of Article 15 or Schedule D, but to Giant's allegedly uneven application of the call-in and tardiness requirement. This question is not preempted by § 301.[5]

5. Seniority Rights

[5] Defendant argues again that the court must interpret Article 10, this time to determine whether Defendant had good cause to discharge Plaintiff for these infractions. As previously noted, however, Plaintiff does not dispute Defendant's right to terminate an employee for good cause. *See supra* at 12.

Plaintiff's amended complaint describes in detail her alleged harassment at the hands of another driver, Oscar Edwards. *See* paper no. 14, at ¶¶ 26-37. Defendant asserts that Plaintiff's amended complaint includes a claim for violation of her seniority rights, *see* paper no. 19, at 23-24, thereby requiring the court to interpret Article 11 of the CBA, which grants those rights. Plaintiff, however, has not brought a separate claim for violation of seniority rights; rather, her description of Edwards' treatment of the tractor they both drove is part of a storyline documenting race and sex discrimination in the resolution of the grievances she filed about Edwards' behavior. "[Vice President David] Lawson got back to Taylor about her complaints and never responded to her concerns. However, [when] [sic] Caucasian drivers complained about Edwards' conduct and use of their assigned tractor[,] [sic] Giant immediately responded and resolved the problem." Paper no. 14, at ¶ 37. Whether Defendant discriminated against Plaintiff by handling her grievances differently than those of white, male employees does not turn on interpretation of any term of the CBA. Therefore § 301 does not preempt this claim.

6. Mishandling Of, and Misrepresentations Related To, Grievances

Finally, Defendant asserts that Plaintiff, in filing a series of grievances concerning the incidents underlying her claims, has assured § 301 preemption because "any claims based on the manner in which Giant resolved her grievances plainly arise under the CBA and cannot be resolved without interpreting the CBA." Paper no. 19, at 25. Defendant is incorrect. Whether a plaintiff's claims "arise under" a CBA depends on what claims that plaintiff chooses to file, and if a plaintiff can prove her claims without the need to interpret the CBA, § 301 does not preempt. It simply does not follow that since Plaintiff's claims in court stem from Defendant's handling of grievances based in the CBA, resolution of those claims requires interpretation of the CBA. In claiming race and sex discrimination, Plaintiff asserts not that the CBA was violated, but that provisions of the CBA were applied differently to her than to others because she is African American and female. Such claims do not necessarily require interpretation of any terms of the CBA if she can show that she was subject to one application of the CBA while white male employees were subject to another. The obligation not to discriminate exists independently of the CBA, and "preemption is to be applied only to 'state-law rights and obligations that do not exist independently of private

agreements.'" *Martin Marietta Corp.,* 38 F.3d at 1397 (quoting *Allis-Chalmers,* 471 U.S. at 211).

IV. Conclusion

In summary, Plaintiff's claims of discrimination and retaliatory discharge are not preempted by § 301, but it is unclear whether her misrepresentation and deceit claim will be preempted. If so, then a federal claim remains, remand will be denied at this time, and the court will consider Defendant's motion to dismiss. (Remand can again be considered if the federal claim is then dismissed.) If there is presently no federal claim, and all of Plaintiff's claims are state law claims, the court will remand this case to state court.

Because the question whether to remand to state court and depends on information Plaintiff must supply in her more definite statement, the court holds in abeyance both Plaintiff's motion to remand and Defendant's motion to dismiss. A separate Order will follow.

/s/
DEBORAH K. CHASANOW
United States District Judge

September 13, 2004